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No. 504

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STEELWORKERS OF AMERICA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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INDEX

CITATIONS

	Page
Cases:	
Arizona v. *California*, No. 9 Original	21
Debs, In re, 158 U.S. 564	21
United States v. *Republic Steel Corp.*, pending this Term, No. 56	21
Wisconsin, et al. v. *Illinois*, Nos. 2, 3, 4 Original	21
Statutes:	
Clayton Act, 15 U.S.C. 18	20
Defense Production Act of 1950, 50 U.S.C. App. 2071(a)	9
Fair Labor Standards Act, 29 U.S.C. 201	21
Rivers and Harbors Act of 1899, 33 U.S.C. 403	21
Robinson-Patman Act, 15 U.S.C. 13	20
Sherman Act, 15 U.S.C. 1-2	20
Universal Military Training and Service Act, 50 U.S.C. App. 468	9
Webb-Pomerene Export Trade Act, 15 U.S.C. 65	20
15 U.S.C. 72	20
Miscellaneous:	
H. Rep. 245, 80th Cong., 1st Sess., p. 114	3

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As we have previously indicated to the Court, our brief in opposition to certiorari will also serve as our primary argument on the merits. In the main, we believe that that brief adequately answers the contentions now made or suggested by the petitioner. However, it may be helpful to add some supplementary comments on certain of the arguments in the certiorari petition, particularly those in which petitioner appears to have shifted its positions from the ground taken in the courts below.

I

Basic to all its other contentions is petitioner's primary argument that the impact of the strike on

the economy as a whole is immaterial, and that the justification for the injunction can be found only in specific shortages of steel for specific defense projects. For none of petitioner's other contentions is relevant to the finding of the burgeoning economic dislocation resulting from the strike. No deficiency or lack of specificity of the evidence supporting that finding is or can be claimed. If necessary, in fact, the Court could take judicial notice of the inevitable and widespread ramifications on the economy of an exhaustion of steel inventories; the statistics showing the status of steel inventories and the already-experienced unemployment fully establish the imminence of great economic disruption. That effect plainly flows, not from the absence of the production of a few isolated plants (as is erroneously said to be the cause of the defen shortages), but from the entire strike. And petitioner does not claim that the general economic crisis could be forestalled by a decree reopening only a small number of plants or otherwise suggest any ground for the exercise of an asserted discretionary power to deny or limit the injunction notwithstanding the general peril to the economy.

Thus, petitioner's entire case depends upon sustaining its initial contention that an economic crisis does not affect the "national health or safety" as those terms are used in the statute; as we have shown in our main brief (pp. 46–51), that contention must fail. We will add here only that nothing in the statements of Congressman Kennedy, upon which petitioner relies (Pet. 14–15), is inconsistent with our interpre-

tation of the Act.[1] That he objected to a "public interest" standard because it "could cover anything" does not mean that he gave to "health or safety" the rigidly circumscribed meaning attributed to that phrase by petitioner. The natural meaning of his comments was that he thought that "health or safety" was a sufficiently flexible standard to make unnecessary the addition of the much broader "public interest" standard. That is confirmed, moreover, by the supplemental minority report filed by Congressman Kennedy when the House committee reported out the bill. Although similarly objecting there that the "word 'interest' is weak and indefinite"—as well as objecting to the temporary nature of the injunction because a strike which "imperils the public health or safety * * * should continue to be illegal as long as the emergency exists"—he agreed that "some method must be worked out to deal with strikes which *cripple the Nation's industrial power*." [Emphasis added.] H. Rep. No. 245, 80th Cong., 1st Sess., p. 114. Since he then proposed, to "achieve this goal", an amendment providing for a permanent injunction upon a finding that a strike "imperils the public health or safety" (*ibid.*), it is clear that he viewed "public health or safety" as a sufficiently broad stand-

[1] We may point out also that those comments, made on the floor of the House in opposition to the House bill and rejected by the House itself, are in any event hardly an authoritative source for the meaning of a bill separately drafted in the Senate and substituted for the House bill. Indeed, since the declaration of policy in the Act as finally passed contained the very language to which Congressman Kennedy objected (see Br. in Opp., pp. 47-48, n. 26), it may be inferred that the Senate draftsmen and the conferees did not accept his view.

and to encompass strikes "which cripple the Nation's industrial power." Petitioner's recital of legislative history thus can prove, at most, only that "national health or safety" and "public interest" are not synonomous—with which we may readily agree—and not that the former relates exclusively to biological health and military preparedness. Though more limited than "public interest" and suggesting a greater immediacy and severity of the threat, the "national health or safety" may nevertheless be imperiled, in Congressman Kennedy's own use of those terms, by strikes "which cripple the Nation's industrial power."[2]

II

The bulk of petitioner's contentions proceed, as we have noted, on the assumption that the finding that the national health or safety is imperiled can be sustained only on the basis of shortages of steel for essential defense projects. Most of the arguments based on that assumption have been answered in our main brief, and we will deal here only with the con-

[2] The statement by Congressman Kennedy that "an automobile strike * * * does not affect health and safety" (Pet. 15) is fully consistent with our position, for a strike in the automobile industry would have much less effect on the economy as a whole than a steel strike—for the simple reason that the steel industry produces a basic raw material essential to the rest of the economy while the automobile industry produces end-products on which a much smaller part of economy is dependent. However, even a prolonged automobile strike might ultimately have sufficiently grave effects on the economy—more likely through a multiplying diminution of general purchasing power than through a shortage of automobiles—to reach an emergency stage.

tentions (a) that the national defense peril does not result from a strike affecting a "substantial part" of the industry, and hence that the jurisdictional prerequisites were not established, and (b) that the court below failed to exercise its discretion.

A. Petitioner contends that the jurisdictional requirements have not been met because less than a "substantial part" of the industry would have to be reactivated to meet essential defense needs. Aside from the basic error in the factual assumption,[1] the premise that the part of the struck industry that is essential must itself constitute a "substantial part" of the industry is, we believe, patently untenable under the Act. According to that interpretation, for example, if a strike affecting 50% of the coal industry would not imperil the national health and safety, a strike affecting 60% of the industry could not be enjoined even though it did imperil the national health and safety unless it could be shown that the marginal 10% that made the strike an emergency was itself a "substantial part" of the industry. Clearly, if the portion of the struck industry that is "essential" is relevant at all, it is relevant only to the proper scope of the relief to be granted (discussed *infra*) and not to the court's jurisdiction. The jurisdictional prerequisites are met if, as is admittedly true here, the portion of the industry that is *struck* is a "substantial part" and a continuance of the *entire* strike would imperil the national health or safety.

[1] As we shall later show, in this case the number of plants that would need to be reopened to meet defense needs would in fact probably constitute considerably more than a substantial part of the industry.

B. It is and has been our position that, once the statutory conditions have been met, the injunction provided for by the statute should issue as a matter of course, at least in the absence of a showing of exceptional circumstances by the defendant justifying a discretionary denial or limitation of the injunction. Because of the emphasis placed by petitioner on the district court's alleged failure to exercise, or abuse of, its discretion, it is appropriate to spell out in greater detail the basis for that position.

1. Section 208 of the Act provides simply that if the court finds that a strike is industry-wide and "will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike." But while phrased in terms of "jurisdiction", the statute, by its own force, also creates a substantive "right" in the Government. Without that, there would be nothing upon which to exercise the granted jurisdiction. See Br. in Opp., pp. 32 *ff*. The content of that substantive right cannot, from the terms of the statute, be defined other than as a substantive right to have the injunction issue when the statutory conditions are met. In terms, moreover, that right extends to having the entire strike—*i.e.*, "such strike"—enjoined; it is not limited to having only so much of the strike enjoined as will alleviate the emergency (even if that were possible).

Under the statute the injunctive remedy and the substantive right are thus indissolubly joined together. This is not a case in which the equitable jurisdiction of a court is invoked to provide one remedy for a gen-

eral right otherwise existing and otherwise remediable. For that reason, the usual doctrines of equitable discretion—part of the law of "remedies"—cannot be uncritically applied; to the extent that they are applied, they qualify or modify the very right which Congress has created in the Government. It is entirely appropriate to conclude, therefore, that Congress, having expressly stated the conditions under which the United States is entitled to an injunction, intended the district court to have at most only a very narrow discretion to decline to issue the injunction when those conditions were met. The same inference is to be drawn from the very nature of the showing that must be made to satisfy the statutory conditions—namely, a peril to the national health or safety, an interest so dominant that Congress must have viewed it as normally overriding any lesser interests that might otherwise appeal to a court's equitable discretion.

At the very least, the terms of the statute give the Government a prima facie right to the injunction upon satisfying the statutory conditions, and the burden is then on the defendant to demonstrate the extraordinary circumstances that might justify modification of that right. Petitioner, as we shall show, has made no such showing in this case.

2. In the district court, petitioner contended that, even if the statutory prerequisites were established, the court should nevertheless in its discretion deny the injunction for two reasons. It argued, first, that a denial of the injunction would produce a prompt

settlement and that the public interest would better be served by a settlement than by an injunction; and, second, that the Government had other adequate remedies to meet its essential defense needs.[2] The court properly found both bases to be inadequate to justify denial of the injunction.

For reasons shown in our main brief (pp. 52–57), the likelihood that the dispute might be settled without the injunction, even if it could be established, is not a valid basis for a discretionary denial of the injunction, for the very essence of the national emergency provisions is the Congressional judgment that the public interest in an immediate termination of a work stoppage imperiling the national health or safety overrides any interest in allowing the parties to proceed, without interference, to settle their dispute by the normal processes of collective bargaining. Without more, therefore, the court could properly have rejected petitioner's proposed conclusion of law (R. 215) that the court "has discretion * * * to deny an injunction when the public interest will best be served by settlement of the strike through good faith bargaining and not by the issuance of an injunction." In fact, however, the district court did not stop there

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[1] Memorandum for the United Steelworkers (filed in the district court), pp. 29–30.

[2] Memorandum, pp. 13–15, 23–27. In terms, that contention was made, not as an appeal to the court's discretion, but to show that the national health and safety was not in fact imperiled by the strike and hence that the jurisdictional requirements were not met. We will assume, however, that it could also be read as an attempt to invoke the court's discretionary powers to deny the injunction.

but went on to find as a fact, based on the report of the board of inquiry, that "the strike will continue for an indeterminate period" unless the injunction is granted (R. 245).

The showing of the other remedies available to the Government was no more adequate. As we have pointed out in our main brief (pp. 10, 14, 43–46), the priority and allocation powers under the Defense Production Act of 1950 (50 U.S.C. App. 2071(a)) do not meet the conceded fact that some items essential to the national defense are not produced by any of the mills now operating; and there are other major difficulties.[*] The power of seizure under the Universal Military Training and Service Act (50 U.S.C. App. 468) is likewise totally inadequate. In terms, it authorizes the President to seize a plant—from which materials have been unsuccessfully ordered—solely for the purpose of producing such "materials as may be required by the Government." Petitioner no longer disputes that reactivating a steel plant solely to supply the limited needs of the Government would be an exhorbitantly costly and wasteful use of

[*] The petition (Pet. 21 2) claims that the Government has not as yet made sufficient use of its priority and allocation powers. But the fact is that, under the defense certificate system which has been in effect for some time, defense needs have been given priority by the mills still operating to the extent allowable by existing production and inventories. The order of the Business and Defense Services Administration of October 16, 1959 (which petitioner criticizes) was simply designed to facilitate delivery of steel for defense purposes on the reopening of the struck plants, by modifying the priority system to take account of problems resulting from a simultaneous reopening of many plants.

our steel-producing facilities, and there is at least a very serious question whether the Government, to avoid economic waste, would have the incidental power to reopen the seized plant for all purposes. Moreover, all the objections noted *infra* to an injunctive decree reopening only selected plants would equally apply to the use of a selective seizure power, and would, in fact, be aggravated by the inevitable delays in setting the seizure procedure in motion. Finally, as we have noted (Br. in Opp., p. 45), there is no basis for inferring that Congress intended to give priority to the seizure powers and require them to be exhausted first before utilizing the Taft-Hartley procedures, and the latter in fact was clearly the procedure specifically designed to deal with nation-wide strikes. Again, however, the district court did not rest on the lack of any compulsion on the Government to utilize other procedures first, but went on to find specifically both that priority orders were unavailing because many of the special items needed "are not carried in inventory or produced by the plants still in operation" (R. 246) and that there was "no adequate remedy at law" (R. 247, 248).

Notwithstanding the court's specific consideration and rejection of the very claims for discretionary

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[7] Petitioner's offer voluntarily to "cooperate" with the Government in reopening whatever plants could be shown to be essential (Pet. 24) is likewise subject to those same objections. Moreover, even if those problems did not exist, we do not think the Government could be required to forego its statutory remedy and rely instead for the protection of the national health or safety upon its being able successfully to "bargain" with the union for the reopening of selected plants.

denial of the injunction put forward by petitioner, petitioner now claims (Pet. 22–23) that the district court denied that it had any discretion at all. If petitioner means that the district court did not engage in an abstract speculation whether any circumstances might ever exist which would justify discretionary denial of the injunction, but confined itself to finding that the circumstances put forward by petitioner were inadequate, we may readily agree, for that is all the court had any obligation to, or could properly, decide. If petitioner means that the court refused to consider the equitable considerations put forward by it, that is simply not so, as the foregoing discussion of those contentions demonstrates. Petitioner notes, however, that the court overruled its proposed conclusion of law "that the court had discretion" (Pet. 23), but as noted above the conclusion rejected was not that the court had discretion in the abstract but rather that the court had discretion to deny the injunction because the public interest would better be served by a negotiated settlement (R. 215), an untenable basis for denial of the injunction. Petitioner again notes the "failure of the District Court even to inquire into the matters properly bearing on the exercise of his discretion" (Pet. 24), which reflects a total misconception: the duty was that of petitioner to present a valid basis for the court's exercise of discretion, not of the court to seek out some basis.

Finally, in addition to the careful consideration given by the court to each contention made by petitioner, there is affirmative evidence that the court

assumed that it had the usual powers of an equity court. Not only did it state as its finding of fact and conclusion of law that the strike will "cause irreparable damage and injury to the United States" and that there is "no adequate remedy at law" (R. 247, 248)—the traditional formula for the exercise of equitable powers—but when, in a discussion of the retroactivity issue, it was suggested that "the court, being a court of equity, has the right to impose conditions on his order that the court may deem equitable", the court replied that "I understand that I would have that right" (R. 238). There is, therefore, no basis for petitioner's assertion that the district court failed to "exercise" its discretion, and the implied assertion that it abused its discretion in issuing an injunction is, as we have seen, equally unavailing. In addition, the trial court's exercise of its discretion comes to this Court armed with the explicit finding by the Court of Appeals that there was no abuse (see R. 306–310).

3. Petitioner contends finally that the district court abused its discretion by failing to limit its injunction to the minimum number of plants required to meet essential defense needs. A sufficient answer is that that claim, which looms so large in this Court, was not made at all to the district court. Although petitioner did assert that the shortages of essential items resulted from the shut-down of a limited number of mills producing those items and not from the general strike, that was directed only to petitioner's argument that the *jurisdictional* prerequisites were not met because the peril did not flow from a strike

against a "substantial part" of the industry (the argument discussed as Point II (A), *supra*, and at Pet. 15–19). Petitioner, in short, limited itself to opposing the issuance of *any* injunction, and did not propose a decree restricted to reopening only a part of the industry or make any effort to show that such a decree would be proper or could feasibly be framed.

We need not rely, however, only on petitioner's failure to make the claim in the district court, for it is demonstrable that such a limited decree could not in any event provide a practical solution for the current emergency.

a. Petitioner has now abandoned any claim that mills could feasibly be reopened solely to serve defense needs and concedes that any plants reopened would have to be reopened for all purposes (Pet. 18–19). We take it that the concession extends to reopening whatever integrated complex of mills and supporting facilities would be necessary for efficient operation by the affected companies. Petitioner fails to realize that its concession would probably require the reopening of a large proportion of the struck plants, and that, even if a smaller number would suffice, problems of enormous complexity would be encountered in framing such a decree.

First, it must be determined what steel products are and will be needed for essential defense programs. While the shortages that have already been encountered have related primarily to rather specialized items—*e.g.*, a special stainless steel needed for the ATLAS missile—the planning cannot end there. As wartime experience has taught, delays can be caused by want

of a horseshoe nail (or its modern-day equivalent, the cotter-pin) no less than by want of a nose-cone, and avoidance of bottle-necks requires programming of the needs of the fourth-tier supplier as well as of the contractor working at the launching pad. While the pinch on suppliers using unspecialized kinds of steel may not yet have been felt because of their initially large, but now vanishing, inventories, the lead-time necessary to reactivate plants and process the steel into the necessary product requires that their needs months hence be anticipated at this time and provided for in determining which plants should be reopened and in establishing an allocation system to assure that available steel is channeled to essential uses. While it might conceivably be possible to develop such an over-all plan, as shown by the efforts during World War II, it would not be possible, short of total mobilization, to create a comparable plan for the short-term purposes of a strike—a plan which would be both effective and non-discriminatory. And, in any event, there would have to be clear Congressional authorization.

Even if defense needs were already fully programmed, moreover, there would remain the no less overwhelming task of reorganizing the steel industry to operate on a minimum basis adequate to supply those needs. The first problem would be that of selecting which of several companies that could equally supply a particular need should be reopened, and no one has yet suggested an equitable basis for a selection having such serious consequences both to the companies involved and their employees. And

whatever basis were arrived at, serious inequities would be inevitable. For example, while there is no evidence in the record on the question—since the district court was not asked to and did not undertake such a task—we are reliably informed that there are some items for which the largest companies, United States Steel and Bethlehem Steel, are the sole source, and it would be essential to reopen their plants. Since the economic unit of operation for those companies is likely to be great, in order to minimize the number of mills to be reopened it would be necessary to satisfy defense needs as much as possible out of the production of those companies incidentally necessary to their production of the sole-source items. The result might well be that the largest companies would be restored to almost full production while the small companies remain struck. The anti-competitive effect of such a result is no less obvious than its inequities.

Having selected the companies to be reopened, the next step would be to determine the minimum unit of production that can be operated efficiently by each company. That judgment could not be based solely on the technical problems of separating out of the integrated mass of operations the facilities essential to constitute a self-sufficient unit. Cost is no less a factor and, because of overhead and the possible indivisibility of at least some of the operations, it is very likely that minimum costs require a larger scale of operation than would physical and technical problems alone. Thus, as to each company, the final judgment would require a detailed cost and engineer-

ing analysis of its entire operations. And even with the necessary information amassed and analyzed, the court would be required to make a judgment of how much additional cost the companies (or, perhaps ultimately, the Government) should be required to bear in order to minimize the scope of their operations.

b. Petitioner avoids dealing with the practical impossibility of planning such a complete reorganization of the steel industry by simply assuming that the burden of proof was on the Government, and asserting that the Government failed to prove that an injunction of the entire strike was necessary. A complete answer is that the statute on its face provides for an injunction of the entire strike once the statutory conditions are met, and the burden is on the defendant to establish the "defense" or "exception" that something less would satisfy the needs of the national health or safety. Petitioner did not make that effort in the trial court.

Moreover, we think that Congress quite wisely avoided imposing on the courts the duty of engaging in any such fruitless inquiry in circumstances such as those present here. Petitioner asserts that it is unreasonable to believe that Congress intended an entire strike to be enjoined simply because of shortages that could be met from a "handful" of mills. When the emergency nature of the proceedings, and the consequent necessity for expedited court proceedings, is recognized, it appears not unreasonable at all. To make use of petitioner's metaphor (Pet. 18), an elephant gun can quite sensibly be used to

bring down a gnat if no other tool is at hand and the gnat is dangerous enough.

There are other cogent reasons, besides the impossibility of completing the inquiry before its need is long past, why Congress would not have wanted to provide for partial injunctions. One, which has already been noted, is the lack of a standard by which to determine which part of the strike to enjoin and the inequity both to employers and employees of a discriminatory reopening of the plants. Another is the questionable nature of the premise upon which petitioner's entire argument is based—namely, that the extent to which the normal processes of collective bargaining are disturbed by an injunction is a factor to be taken into account in melding the scope of the injunction.

But for the effect upon the bargaining position of the parties, equitable considerations would point toward enjoining the entire strike, for even if some of the production is not "essential" its restoration is certainly in the public interest and in the immediate interest of both employers and employees. The countervailing "equity" upon which petitioner asks for a decree limited to part of the industry cannot be that a partial injunction would give it a stronger, and the companies a weaker, bargaining position than

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Were the court to undertake a hearing to devise a limited decree capable of protecting the national health or safety while minimizing its scope, it would have little choice, if the statutory purpose were not to be defeated altogether, but to grant a preliminary injunction against the entire strike, pending the inquiry. We think it evident that the necessary inquiry could not be completed until the maximum 80-day period had long since expired.

would a total injunction—for there is no basis to prefer one party to the other. The argument must rather be that the general policy to promote unfettered collective bargaining requires, if possible, that the injunctive decree be so framed as to *minimize* its effect on the bargaining positions of the parties. Petitioner's only valid claim is not that the knife should cut in its favor rather than in favor of the employers, but that it should cut as little as possible.

Petitioner simply assumes that a decree enjoining part of the strike would have less total impact on the bargaining positions of the parties than would one enjoining the whole strike. But that assumption, which is essential to petitioner's entire equitable claim, is not at all self-evident. Assume, for example, that an injunction were issued which restored substantially all of the production of the United States Steel Company and the Bethlehem Steel Company, but not of any others. Such an injunction would probably destroy the united front of the steel companies, and the effect could well be to force the remaining struck companies immediately to acquiesce in the union's demands. At the end of the 80 days, the companies whose strike was enjoined would then be in the same position, and might equally be compelled immediately to settle. Such an injunction would be more favorable to the *union* than one running against the entire strike, and it might well in fact be more favorable to it than a continuation of the entire strike. That does not mean, however, that it would have any less impact upon the bargaining process, and it might well have more. In short, the

effect would obviously be different in kind but not necessarily in degree.

It cannot be assumed, therefore, that the effect of the decree on bargaining is minimized simply by minimizing the scope of the decree. Thus, to support an "equitable" claim to have one kind of decree rather than another, it is not sufficient (or even relevant) to show that one is more limited in scope than another; petitioner must show instead that the bargaining position of the parties will be less disturbed by one than the other. Obviously, however, such effects cannot be quantitatively measured, and we do not believe that Congress intended to put upon the courts the duty of appraising the potential effects of various possible decrees upon such intangible factors. For those reasons, we submit that Congress concluded that there was no appropriate way for the courts to mold their decrees to minimize the effect on the bargaining positions of the parties and that, accordingly, controlling weight should be given to the other more tangible advantages of restoring full production, to satisfy the nation's needs, by enjoining the entire strike.

III

On the constitutional point, the petition adds the new argument that the statutory requirement of a finding that the strike (if continued) "will imperil the national health or safety" is beyond judicial competence, and invalidly requires the judge to be an uncontrolled prophet and an "economist" (Pet. 26–27). This belated contention cavalierly disregards

the history of Anglo-American jurisprudence which has long imposed on courts comparable fact-finding problems to be solved on the basis of the evidence and arguments proffered by the parties. Evaluating future events and making forecasts is a normal part of day-to-day judicial business. And the issue of whether the continuation of a particular strike will imperil the national health *or* safety is at least as concrete and definite as other questions with which the courts have regularly been dealing; it requires no greater degree of unguided prophecy or economic appraisal, but involves conventional factual issues determinable on evidence. The effects of a prolongation of non-production of steel on defense and on the general economy are measurable and definite, as the affidavits in this case. See our main brief, pp. 43 *ff.* Antitrust legislation, for instance, often imposes on the federal courts fact-finding responsibilities of comparable or greater breadth, requiring sophisticated economic appraisal and prophecy.[9] There is also leg-

[9] Cf., *e.g.*, the Sherman Act, 15 U.S.C. 1-2 ("restraint of trade"; "monopolize, or attempt to monopolize", "combine * * * to monopolize any part" of interstate commerce); Clayton Act, 15 U.S.C. 18 (an acquisition will "substantially" "lessen competition, or to tend to create a monopoly"); Robinson-Patman Act, 15 U.S.C. 13 ("the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition"); Webb-Pomerene Export Trade Act, 15 U.S.C. 65 (any act "which artificially or intentionally enhances or depresses prices within the United States" "or otherwise restrains trade therein"); 15 U.S.C. 72 ("intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles").

islation dealing with affects on or obstructions of interstate commerce which requires the courts to make such determinations without administrative guidance.[10] And the adjudication by this Court of disputes between states (or between states and the Federal Government) over interstate waters often involves very complex and difficult problems of economic and social appraisal and evaluation. Cf. *Arizona* v. *California*, No. 9 Original; and *Wisconsin, et al.* v. *Illinois*, Nos. 2, 3, 4 Original. In short, the responsibility Congress has imposed on the federal courts in Section 208 of the Labor Management Relations Act of 1947 does not differ in kind or degree from the responsibilities they have long been bearing. Congress has not asked the courts to go beyond their proper sphere.

[10] Cf., *e.g.*, Fair Labor Standards Act, 29 U.S.C. 201; Rivers and Harbors Act of 1899, 33 U.S.C. 403 (see *United States* v. *Republic Steel Corp.*, pending on writ of certiorari, No. 56, this Term); *In re Debs*, 158 U.S. 564.

CONCLUSION

For the foregoing reasons, and those set forth in our brief in opposition, it is submitted that the judgment below should be affirmed. In that event, we request that the judgment of this Court should issue forthwith under Rule 59 of the Revised Rules of the Court, and that the stay of injunction should also be vacated.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

No. 504.—October Term, 1959.

United Steelworkers of America, Petitioner, v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[November 7, 1959.]

Per Curiam.

The Attorney General sought and obtained in the District Court for the Western District of Pennsylvania an injunction against the continuation of an industry-wide strike of workers in the basic steel industry pursuant to § 208 of the Labor Management Relations Act, 61 Stat. 155, 29 U. S. C. § 178. We granted certiorari, — U. S. —, to review the judgment of the Court of Appeals for the Third Circuit, — F. 2d —, affirming the District Court. In pertinent part, § 208 provides that if the District Court—

> "finds that . . . [a] threatened or actual strike or lock-out—
>
> "(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and
>
> "(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate. . . ."

The arguments of the parties here and in the lower courts have addressed themselves in considerable part to the propriety of the District Court's exercising its equi-

table jurisdiction to enjoin the strike in question once the findings set forth above had been made. These arguments have ranged widely into broad issues of national labor policy, the availability of other remedies to the executive, the effect of a labor injunction on the collective bargaining process, consideration of the conduct of the parties to the labor dispute in their negotiations, and conjecture as to the course of those negotiations in the future. We do not believe that Congress in passing the statute intended that the issuance of injunctions should depend upon judicial inquiries of this nature. Congress was not concerned with the merits of the parties' positions or the conduct of their negotiations. Its basic purpose seems to have been to see that vital production should be resumed or continued for a time while further efforts were made to settle the dispute. To carry out its purposes, Congress carefully surrounded the injunction proceedings with detailed procedural devices and limitations. The public report of a board of inquiry, the exercise of political and executive responsibility personally by the President in directing the commencement of injunction proceedings, the statutory provisions looking toward an adjustment of the dispute during the injunction's pendency, and the limited duration of the injunction, represent a congressional determination of policy factors involved in the difficult problem of national emergency strikes. This congressional determination of the policy factors is of course binding on the courts.

The statute imposes upon the courts the duty of finding, upon the evidence adduced, whether a strike or lockout meets the statutory conditions of breadth of involvement and peril to the national health or safety. We have accordingly reviewed the concurrent findings of the two lower courts. Petitioner here contests the findings that the continuation of the strike would imperil the national health and safety. The parties dispute the meaning of

the statutory term "national health"; the Government insists that the term comprehends the country's general well-being, its economic health; petitioner urges that simply the physical health of the citizenry is meant. We need not resolve this question, for we think the judgment below is amply supported on the ground that the strike imperils the national safety.* Here we rely upon the evidence of the strike's effect on specific defense projects; we need not pass on the Government's contention that "national safety" in this context should be given a broader construction and application.

*The evidence in this regard is reflected in the District Court's findings of fact Nos. 15 (a), (b), (c), and (d), as follows:

"(a) Certain items of steel required in top priority military missile programs of the United States are not made by any mill now operating, nor available from any inventory or from imports. Any further delay in resumption of steel production would result in an irretrievable loss of time in the supply of weapons systems essential to the national defense plans of the United States and its allies.

"(b) The planned program of space activities under the direction of the National Aeronautics and Space Administration has been delayed by the strike and will be further delayed if it is continued. Specifically, project MERCURY, the nation's manned satellite program, which has the highest national priority, has been delayed by the [illegible] delay in construction of buildings essential to its operation. This program is important to the security of the nation. Other planned space programs will be delayed or threatened with delay by a continuation of the strike.

"(c) Nuclear Submarines and the naval shipbuilding program other than submarines, including new construction, modernization, and conversion, have been affected by reason of the inability to secure boilers, compressors, and other component parts requiring steel. Products of the steel industry are indispensable to the manufacture of such items and delay in their production will irreparably injure national defense and imperil the national safety.

"(d) Exported steel products are vital to the support of United States bases overseas and for the use of NATO allies and similar collective security groups. The steel strike, if permitted to continue, will seriously impair these programs, thus imperiling the national safety."

The petitioner suggests that a selective reopening of some of the steel mills would suffice to fulfill specific defense needs. The statute was designed to provide a public remedy in times of emergency; we cannot construe it to require that the United States either formulate a reorganization of the affected industry to satisfy its defense needs without the complete reopening of closed facilities, or demonstrate in court the unfeasibility of such a reorganization. There is no room in the statute for this requirement which the petitioner seeks to impose on the Government.

We are of opinion that the provision in question as applied here is not violative of the constitutional limitation prohibiting courts from exercising powers of a legislative or executive nature, powers not capable of being conferred upon a court exercising solely "the judicial power of the United States." *Keller* v. *Potomac Elec. Power Co.*, 261 U. S. 428; *Federal Radio Comm'n* v. *General Elec. Co.*, 281 U. S. 464. Petitioner contends that the statute is constitutionally invalid because it does not set up any standard of lawful or unlawful conduct on the part of labor or management. But the statute does recognize certain rights in the public to have unimpeded for a time production in industries vital to the national health or safety. It makes the United States the guardian of these rights in litigation. Cf. *United States* v. *American Bell Tel. Co.*, 128 U. S. 315, 370; *Sanitary District of Chicago* v. *United States*, 266 U. S. 405. The availability of relief, in the common judicial form of an injunction, depends on findings of fact, to be judicially made. Of the matters decided judicially, there is no review by other agencies of the Government. Cf. *Gordon* v. *United States*, 2 Wall. 561, 117 U. S. 697. We conclude that the statute entrusts the courts only with the determination of a "case or controversy," on which the judicial power can operate, not containing any ele-

ment capable of only legislative or executive determination. We do not find that the termination of the injunction after a specified time, or the machinery established in an attempt to obtain a peaceful settlement of the underlying dispute during the injunction's pendency, detracts from this conclusion.

The result is that the judgment of the Court of Appeals for the Third Circuit, affirming that of the District Court, is affirmed. Our mandate shall issue forthwith.

It is so ordered.

MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN: In joining the Court's opinion we note our intention to file in due course an amplification of our views upon the issues involved which could not be prepared within the time limitations imposed by the necessity of a prompt adjudication in this case.

SUPREME COURT OF THE UNITED STATES

No. 504.—October Term, 1959.

United Steelworkers of America, Petitioner, v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[November 7, 1959.]

Mr. Justice Douglas, dissenting.

Great cases, like this one, are so charged with importance and feeling that, as Mr. Justice Holmes once remarked (*Northern Securities Co. v. United States*, 193 U. S. 197, 400–401, dissenting opinion), they are apt to generate bad law. We need, therefore, to stick closely to the letter of the law we enforce to keep this controversy from being shaped by the intense interest which the public rightfully has in it. The statute, which Congress had authority to pass, speaks in narrow and guarded terms. Section 206 of the Labor Management Relations Act of 1947, 61 Stat. 155, 29 U. S. C. § 176, gives the President power to invoke the aid of a board of inquiry whenever he is of the opinion that a strike or lock-out will imperil "the national health or safety." The President in appointing the board of inquiry in this case stated:

> "The strike has closed 85 percent of the nation's steel mills, shutting off practically all new supplies of steel. Over 500,000 steel workers and about 200,000 workers in related industries, together with their families, have been deprived of their usual means of support. Present steel supplies are low and the resumption of full-scale production will require some weeks. If production is not quickly resumed, severe effects upon the economy will endanger the economic health of the nation."

It is plain that the President construed the word "health" to include the material well-being or public welfare of the nation. When the Attorney General moved under §208 for an injunction in the District Court based on the opinion of the President and the conclusions of the board of inquiry, the union challenged the conclusion that "the national health or safety" was imperiled, as those words are used in the Act. The District Court found otherwise, stating five ways in which a continuance of the strike would, if permitted to continue, imperil "the national health and safety":

> "(a) Certain items of steel required in top priority military missile programs of the United States are not made by any mill now operating, nor available from any inventory or from imports. Any further delay in resumption of steel production would result in an irretrievable loss of time in the supply of weapons systems essential to the national defense plans of the United States and its allies.
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> "(b) The planned program of space activities under the direction of the National Aeronautics and Space Administration has been delayed by the strike and will be further delayed if it is continued. Specifically, project MERCURY, the nation's manned satellite program, which has the highest national priority, has been delayed by reason of delay in construction of buildings essential to its operation. This program is important to the security of the nation. Other planned space programs will be delayed or threatened with delay by a continuation of the strike.
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> "(c) Nuclear Submarines and the naval shipbuilding program other than submarines, including new construction, modernization, and conversion, have been affected by reason of the inability to secure boilers, compressors, and other component parts re-

quiring steel. Products of the steel industry are indispensable to the manufacture of such items and delay in their production will irreparably injure national defense and imperil the national safety.

"(d) Exported steel products are vital to the support of the United States bases overseas and for the use of NATO allies and similar collective security groups. The steel strike, if permitted to continue, will seriously impair these programs, thus imperiling the national safety.

"(e) A continuation of the strike will have the ultimate effect of adversely affecting millions of small business enterprises, almost all of which are directly or indirectly dependent upon steel products and most of which lack the resources to stock large inventories. In addition, it will have the effect of idling millions of workers and a large proportion of the facilities in industries dependent upon steel for their continued operation. Manufacturing industries directly dependent on steel mill products account for the employment of approximately 6,000,000 workers and normal annual wages and salaries totalling approximately $34,000,000,000. The products of these industries are valued at over $125,000,000,000. The national health will be imperiled if the strike is permitted to continue."

Here again it is obvious that "national health" was construed to include the economic well-being or general welfare of the country. The Court of Appeals, in sustaining the injunction, was apparently of the same view. This seems to me to be an assumption that is unwarranted. I think that Congress when it used the words "national health" was safeguarding the heating of homes, the delivery of milk, the protection of hospitals, and the like. The coal industry, closely identified with physical health of people, was the industry paramount in the de-

bates on this measure. The coal industry is indeed cited on the Senate side in illustration of the need for the measure. S. Rep. No. 105, 80th Cong., 1st Sess., p. 14. There were those in the Senate who wanted to go so far as outlaw strikes "in utilities and key nation-wide industries" in order to protect the "public welfare." 93 Cong. Rec. A1035. Reference was, indeed, made to strikes in industries "like coal or steel" among those to be barred in "the public interest." *Ibid.* But the Senate did not go that far. The Senate bill reached only situations where there was peril to the "national health or safety."[1] The House bill went further and included cases where there was peril to "the public health, safety, or interest."[2] The Senate view prevailed, that version being adopted by the Conference.[3] Some light is thrown on the wide difference between those two standards—if words are to be taken in their usual sense—by the following colloquy on the floor of the House:[4]

> "Mr. KENNEDY. I believe that this country should certainly be in a position to combat a strike that affects the health and safety of the people. Therefore, I feel that the President must have the power to step in and stop those strikes. I am not in the position of opposing everything in this bill, but there are certain things in the bill that are wrong. I do not see how the President is going to have the power to stop strikes that will affect the health and safety of the people under the procedure listed in section 203. I think he must have that power.
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> "I agree with you that any bill providing for an injunction should carefully consider the position of

[1] Legislative History of the Labor Management Relations Act, 1947 (Gov. Print. Off. 1948), Vol. I, pp. 274, 276.

[2] Legislative History, Vol. I, *supra*, Note 1, pp. 214-215.

[3] H. R. Rep. No. 510, 80th Cong., 1st Sess., p. 64.

[4] 93 Cong. Rec. 3513.

the striking union and make sure that their rights are protected. I think that in those cases Federal seizure until the dispute is settled would perhaps equalize the burden in the fairest possible manner.

"Mr. OWENS. Will not the gentlemen admit that we have a third word in there? It is 'interest.' Could we not better use the word 'welfare' instead of 'interest,' because the word 'welfare' occurs in the Constitution? It is just as broad as the word 'interest' and more practical.

"Mr. KENNEDY. The proposal embraces two separate things, health, and safety. Because the remedy is drastic these two, in my opinion, are sufficient. I believe we should apply this remedy when the strike affects health or safety, but not the welfare and interest, which may mean anything. I would not interfere in an automobile strike because while perhaps that affects national interest, it does not affect health and safety.

"Mr. OWENS. Does not the gentleman agree that 'welfare' is the stronger and in line with the President's idea?

"Mr. KENNEDY. No. Both 'welfare' and 'interest' are too indefinite. They could cover anything. I would not have the law apply except in cases where the strike affected health and safety."

To read "welfare" into "health" gives that word such a vast reach that we should do it only under the most compelling necessity. We must be mindful of the history behind this legislation. *In re Debs*, 158 U. S. 564, 584, stands as ominous precedent for the easy use of the injunction in labor disputes. Free-wheeling Attorneys General used compelling public demands to obtain the help of courts in stilling the protests of labor. The revulsion against that practice was deep; and it led ultimately to the enactment of the Norris-LaGuardia Act.

47 Stat. 70, 29 U. S. C. § 101.[3] We deal of course with a later Congress and an Act that sets aside by § 208 (b) *pro tanto* the earlier Act. What Congress has created Congress can refashion. But we should hesitate to conclude that Congress meant to restore the use of the injunction in labor disputes whenever that broad and all-inclusive concept of the public welfare is impaired. The words used—"national health or safety"—are much narrower.

Congress in the same Act knew how to speak when it spoke all-inclusively. The policy statement in the Labor Management Relations Act of 1947 speaks in broad terms. There is a declaration in the preamble that "neither party has any right in its relations with any other to engage in act or practices which jeopardize the public health, safety, or interest." 61 Stat. 136. The words "public . . . interest" cover five titles of a far-reaching regulatory measure. Yet when Congress came to define the jurisdiction of courts to intervene in strikes or lock-outs it spoke in more restricted terms, confining the judiciary to injunctions where there is impending peril to "the national health or safety." That narrow reading is, indeed, the only one that can be squared with Senator Taft's explanation of the use of an injunction in a strike situation. The strike, he said, must not only

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[3] For discussion of the abusive use of blanket injunctions in labor controversies, see Allen, Injunction and Organized Labor, 28 Am. L. Rev. 828; Chafee, The Inquiring Mind, p. 198; Dunbar, Government by Injunction, 13 L. Q. Rev. 347; Frey, The Labor Injunction: An Exposition of Government by Judicial Conscience and its Menace; Lane, Civil War in West Virginia; Pepper, Injunctions in Labor Disputes, 49 A. B. A. Rep. 174; Royce, Labor, The Federal Anti-Trust Laws, and the Supreme Court, 5 N. Y. U. L. Q. Rev. 19; Stimson, The Modern Use of Injunctions, 10 Pol. Sci. Q. 189.

On the Norris-LaGuardia Act and what Congress intended to abolish by it, see Norris, Injunctions in Labor Disputes, 16 Marq. L. Rev. 157; Witte, The Federal Anti-Injunction Act, 16 Minn. L. Rev. 638.

affect substantially "an entire industry," it must also "imperil the national health or safety, a condition which, it is anticipated will not often occur."[6] Yet if "national health" includes the public welfare, injunctions will issue whenever any important industry is involved—whether it be steel or automobiles or coal or any group of industries where one union makes collective agreements for each of the component unions.

It is a fact of which we can take judicial notice that steel production in its broadest reach may have a great impact on "national health." Machinery for processing food is needed; hospitals require surgical instruments; refrigeration is dependent on steel; and so on. Whether there are such shortages that imperil the "national health" is not shown by this record. But unless these particularized findings are made no case can be made out for founding the injunction on impending peril to the "national health."

Nor can this broad injunction be sustained when it is rested solely on "national safety." The heart of the District Court's finding on this phase of the case is in its statement, "Certain items of steel required in top priority military missile programs are not made by any mill now operating, nor available from any inventory or from imports." Its other findings, already quoted, are also generalized. One cannot find in the record the type or quantity of the steel needed for defense, the name of the

[6] 93 Cong. Rec. 6860.

Senator Smith said in like vein:

"Furthermore in title II of the bill we provide for the extreme cases which threaten national paralysis. To meet an industry-wide stoppage of some kind which may cause injury to the health or safety of 140,000,000 people, such as a transportation strike, or a coal strike, we have set up special machinery which will enable the Attorney General, on his own initiative, to petition the courts to prevent either a shut-down or a walk-out, until the mediation processes have had time to function." 93 Cong. Rec. 4409.

plants at which those products are produced, or the number or the names of the plants that will have to be reopened to fill the military need. We do know that for one and a half years ending in mid-1959 the shipments of steel for defense purposes accounted for less than 1% of all the shipments from all the steel mills. If 1,000 men, or 5,000 men, or 10,000 men can produce the critical amount the defense departments need, what authority is there to send 500,000 men back to work?

There can be no doubt that the steel strike affects a "substantial" portion of the industry. Hence the first requirement of § 208 (a) of the Act is satisfied.[2] But we do know that only a fraction of the production of the struck industry goes to defense needs. We do not know, however, what fraction of the industry is necessary to produce that portion.[3] Without that knowledge the District Court is incapable of fashioning a decree that will safeguard the national "safety," and still protect the rights of labor. Will a selective reopening of a few mills be adequate to meet defense needs? Which mills are

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[2] Section 208 (a) provides:

"Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

"(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

"(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate."

[3] The record shows, as does the President's statement, *supra*, that mills accounting for at least 15% of the nation's steel production are still in operation and are unaffected by the strike.

these? Would it be practical to reopen them solely for defense purposes or would they have to be reopened for all civilian purposes as well? This seems to me to be the type of inquiry that is necessary before a decree can be entered that will safeguard the rights of all the parties. Section 208 (a) gives the District Court "jurisdiction to enjoin" the strike. There is no command that it *shall* enjoin 100% of the strikers when only 1% or 5% or 10% of them are engaged in acts that imperil the national "safety." We are dealing here with equity practice which has several hundred years of history behind it. We cannot lightly assume that Congress intended to make the federal judiciary a rubber stamp for the President. His findings are entitled to great weight; and I along with my Brethren accept them insofar as national "safety" is concerned. But it is the Court, not the President, that is entrusted by Article III of the Constitution to shape and fashion the decree. If a federal court is to do it, it must act in its traditional manner, not as a military commander ordering people to work willy-nilly, nor as the President's Administrative Assistant. If the federal court is to be merely an automaton stamping the papers an Attorney General presents, the judicial function rises to no higher level than an IBM machine. Those who grew up with equity and know its great history should never tolerate that mechanical conception.

An appeal to the equity jurisdiction of the Federal District Court is an appeal to its sound discretion.[2] One historic feature of equity is the molding of decrees to fit the requirements of particular cases. Equity decrees are not like the packaged goods this machine age produces. They are uniform only in that they seek to do equity in a given case.[3] We should hesitate long before we con-

[2] "Equity has contrived its remedies and has always preserved the elements of flexibility and expansiveness so that new ones may be invented, or old ones modified, to meet the requirements of every

clude that Congress intended an injunction to issue against 500,000 workers when the inactivity of only 5,000 or 10,000 of the total imperils the national "safety." That would be too sharp a break with traditional equity practice for us to accept, unless the statutory mandate were clear and unambiguous. In situations no more clouded with doubt than the present one we have refused to read a statutory authority to issue a decree as a command to do it. *Hecht Co.* v. *Bowles*, 321 U. S. 321. We there said, "A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances." *Id.*, 329. And see *Porter* v. *Warner Co.*, 328 U. S. 395, 398.

Plainly there is authority in the District Court to protect the national "safety" by issuance of an injunction. But there is nothing in this record to sustain the conclusion that it is necessary to send 500,000 men back to work.

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case. *Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.*, 163 U. S. 564, 601. And the extent to which the Court may grant or withhold its aid, and the manner of molding its remedies may be affected by the public interest involved. *United States* v. *Morgan*, 307 U. S. 183, 194. *Securities & Exchange Comm'n* v. *United States Realty Co.*, 310 U. S. 435, 455. There is in fact no limit to the variety of equitable remedies which can be applied to the circumstances of particular case. 1 Pomeroy's Equity Jurisprudence (5th ed.) § 109.

An equity court may, by trial for a limited term, determine how much relief is required to meet the situation, and thereby avoid unnecessary hardship to any of the parties. McClintock on Equity (2d ed.) § 30. Pomeroy, *supra*, §§ 115, 116. This principle has been applied by this Court several times, *e. g.*, where an injunction was sought against the pollution of a stream, the defendant was permitted to construct settling basins to alleviate the injury to the plaintiff and the injunction was modified to allow experiments toward that end. *Arizona Copper Co.* v. *Gillespie*, 230 U. S. 46. And where defendants' smelters emitted noxious fumes an injunction was withheld to permit them to devise a practical method of installing preventing devices. *Georgia* v. *Tennessee Copper Co.*, 237 U. S. 474. See also *Alexander* v. *Hillman*, 296 U. S. 222.

to give the defense department all it needs for the nation's "safety." If more men are sent back to work than are necessary to fill the defense needs of the country, other objectives are being served than those specified in the statute. What are these other objectives? What right do courts have in serving them? What authority do we have to place the great weight of this injunction on the backs of labor, when the great bulk of them affected by it have nothing to do with production of goods necessary for the nation's "safety" in the military sense of that word? Labor injunctions were long used as cudgels—so broad in scope, so indiscriminate in application as once to be dubbed "a 'scarecrow' device for curbing the economic pressure of the strike." See Frankfurter and Greene, The Labor Injunction (1930), pp. 107–108. The crop of evils that grew up during those regimes was different in some respects from those generated by this decree. The problems of vagueness, of uncertainty, of detailed judicial supervision that made police courts out of equity courts are not present here. But the same indiscriminate leveling of those within and those without the law is present. The injunction applies all the force of the Federal Government against men whose work has nothing to do with military defense as well as against those whose inactivity imperils the "national safety." It is not confined to the precise evil at which the present Act is aimed. Like the old labor injunctions that brought discredit to the federal judiciary this is a blanket injunction broad and all inclusive, bringing within its scope men whose work has nothing whatsoever to do with the defense needs of the nation. Being wide of the statutory standard it has, to use the words of Mr. Justice Brandeis, all the vices of the injunction which is used "to endow property with active, militant power which would make it dominant over men." See *Truax* v. *Corrigan*, 257 U. S. 312, 354, 368 (dissenting opinion). I cannot believe that Congress intended the

federal courts to issue injunctions that bludgeon all workers merely because the labor of a few of them is needed in the interests of "national safety."

Some years ago this Court struck down as unconstitutional state statutes making arbitration of labor disputes mandatory. *Wolff Co.* v. *Industrial Court*, 262 U. S. 522; *Dorchy* v. *Kansas*, 264 U. S. 286. Those cases held that compulsory arbitration violated the Due Process Clause of the Fourteenth Amendment. One can only guess as to what institutions of adjudication we might have in this field today had that experiment been given a chance.[1] The experiment, however, did not survive; and we have had little experience with it.[2] Collective bargaining and mediation are today the norm, except for the period of time in which an injunction is in force. By the terms of § 209, however, any injunction rendered may not continue longer than 80 days. The Act thus permits an injunction restricted in duration and narrowly confined by the requirements of the "national health or safety." When we uphold this injunction we force men back to work when their inactivity has no relation to "national health or safety." Those whose inactivity produces the peril to "national health or safety" which the Act guards against and only those should be covered in the injunction. The rest—who are the vast majority of the 500,000 on strike—should be treated like the employers are

[1] It was stated in S. Rep. No. 105, 80th Cong., 1st Sess., pp. 13–14 in reference to the new machinery for settling labor disputes:

"Under the exigencies of war the Nation did utilize what amounts to compulsory arbitration through the instrumentality of the War Labor Board. This system, however, tended to emphasize unduly the role of the Government, and under it employers and labor organizations tended to avoid solving their difficulties by free collective bargaining. It is difficult to see how such a system could be operated indefinitely without compelling the Government to make decisions on economic issues which in normal times should be solved by the free play of economic forces."

treated. They should continue under the regime of collective bargaining and mediation until they settle their differences or until Congress provides different or broader remedies. When we assume that all the steelworkers are producing steel for defense when in truth only a fraction of them are, we are fulfilling the dreams of those who sponsored the House bill and failed in their efforts to have Congress legislate so broadly.

Though unlikely, it is possible that, had the District Court given the problem the consideration that it deserves, it could have found that the only way to remove the peril to national safety caused by the strike was to issue the broad, blanket injunction. It may be that it would be found impractical to send only part of the steelworkers back to work. The record in this case, however, is completely devoid of evidence to sustain that position. Furthermore, there is no indication that the District Court ever even considered such a possibility. I am unwilling to take judicial notice that it requires 100% of the workers to produce the steel needed for national defense when 99% of the output is devoted to purposes entirely unconnected with defense projects.

I would reverse this decree and remand the cause to the District Court for particularized findings [1] as to how the

[1] The particularized findings necessary are illustrated by those in *United States* v. *Steelworkers of America*, 202 F. 2d 132, 134:

"At its Dunkirk plant the company was then engaged in commerce and in the production of goods for commerce, primarily in the 'heat exchanger, pressure vessel and prefabricated pipe industry'; the threatened strike would not have affected all, or a substantial part, of that industry. A major part of the Dunkirk plant's production was to carry out contracts the company had with the Atomic Energy Commission and certain of its prime contractors to furnish specialized articles which were essential to the completion of the Commission's program for construction of facilities needed to produce atomic bombs for the national defense. These essential articles were heat exchanger shells used in the production of heavy water needed to operate

steel strike imperils the "national health" and what plants need to be reopened to produce the small quantity of steel now needed for the national "safety." [12] There would also be open for inquiry and findings any questions pertaining to "national health" in the narrow sense in which the Act uses those words.

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nuclear reactors capable of producing fissionable materials, gas converter assemblies and other critical items all of which could have been obtained elsewhere only after other potential sources had been equipped to produce them. Resort to other sources would, consequently, have involved months of delay and set back correspondingly the construction program of the Commission and the production of fissionable materials and atomic weapons vital to the national defense. The threatened strike would have affected a substantial part of the atomic weapon industry and would have imperiled the national safety."

[12] The factor of "safety" may well involve, for example, the need for replacement of equipment on railroad trains. An affidavit of the Secretary of Commerce states:

"The continuing availability of most of these steel supplies is vital to the nation's health and safety, used as they are for the production of personal necessities, including surgical instruments, heating and refrigeration equipment, and articles used in the preparation and preservation of food. Steel is also essential to transportation, to the production and transmission of light and power, to the provision of sanitation services, and in the construction and mining industries."

But the Government in oral argument conceded that neither that aspect of "safety" nor any other aspect of "safety" apart from military defense is presented by this record, since there are no findings showing the extent to which inventories for those other purposes may be in short supply.